

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES**

**SUNRISE OPERATIONS, LLC, a WHOLLY-
OWNED SUBSIDIARY OF THE PASHA GROUP**

and

**Cases 20–CA–219534
20–CA–227593
20–CA–230861**

**INTERNATIONAL ORGANIZATIONS OF
MASTERS, MATES & PILOTS, ILA/AFL-CIO**

Yasmin Macariola, Esq.,
for the General Counsel.

William Miossi and Kara E. Cooper, Esqs. (Winston & Strawn, LLP)
for the Respondent.

Lisa Demidovich, Esq., (Bush Gottlieb, a Law Group)
for the Charging Party.

DECISION

STATEMENT OF THE CASE

Lisa D. Ross, Administrative Law Judge. On May 2, 2018, the International Organizations of Masters, Mates & Pilots, ILA/AFL-CIO (the Charging Party, MM&P, or the Union) filed an unfair labor practice (ULP) charge against Sunrise Operations, LLC (Sunrise or Respondent), a wholly owned subsidiary of the Pasha Group.¹

On September 18, 2018, the Union filed a second ULP charge against Respondent which was amended on October 2, 2018.² On November 14, 2018, the Union filed a third ULP charge against Respondent.³ On December 28, 2018, Region 20 of the National Labor Relations Board (NLRB) consolidated all three charges and issued a Second Consolidated Complaint and Notice of Hearing (complaint).

The complaint alleges that Respondent violated Sections 8(a)(5) and (1) of the National Labor Relations Act (NLRA or the Act) when it failed/refused to: (1) furnish and/or unreasonably delayed in furnishing necessary and relevant information to the Union; and (2) continue to abide

¹ Case No. 20–CA–219534.

² Case No. 20–CA–227593.

³ Case No. 20–CA–230861.

by Section 36 of a Memorandum of Understanding (MOU) dated June 16, 1984 which required the parties to meet for arbitration proceedings in Linthicum Heights, Maryland.

Respondent filed its answer and amended answer, denying all material allegations and setting forth multiple affirmative defenses to the complaint.

This case was tried in San Francisco, CA from November 6 through 8, 2019. Counsel for the General Counsel as well as counsels for Charging Party and Respondent presented witness testimony along with documentary evidence. After the trial, counsel timely filed extensive post-hearing briefs.

On December 31, 2019, the General Counsel filed a motion to strike three (3) portions of Respondent's brief. Respondent filed its response on January 7, 2020. After carefully reviewing the motion, Respondent's response together with the record, I grant in part and deny in part the General Counsel's motion.⁴

Based upon the entire record, including the testimony of the witnesses, my observation of their demeanor, and the parties' briefs, I conclude that Respondent violated the Act as alleged.⁵

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS

Respondent Sunrise is a limited liability company with an office and place of business in Charlotte, NC. Respondent is a wholly owned subsidiary of The Pasha Group (Pasha). Pasha, which provides diversified global logistics and transportation services to automotive, maritime and relocation industries, has an office and place of business in San Rafael, CA.⁶

It is undisputed that, at all material times, Respondent's gross revenue exceeded \$50,000 by transporting freight between Hawaii and California. Respondent has received goods valued in excess of \$5,000 from points outside the State of California. Accordingly, I find that Respondent is an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act.

It is also undisputed, and I find that, at all material times, the International Organizations of Masters, Mates & Pilots has been a labor organization within the meaning of Section 2(5) of the Act.

⁴ These instances are discussed in more detail below in the appropriate section of the decision.

⁵ Abbreviations used in this decision are as follows: "Tr." for the Transcript, "GC Exh. #" for the General Counsel's exhibits, "CP Exh. #" for Charging Party's exhibits, "R. Exh. #" for Respondent's exhibits, "GC Br." for the General Counsel's brief, "CP Br." for Charging Party's brief, and "R. Br." for Respondent's brief. Specific citations to the transcript and exhibits are included where appropriate to aid review and are not necessarily exclusive or exhaustive.

⁶ The Pasha Group is not a party to this litigation. It is only referenced in this decision because Pasha is the parent company of Respondent Sunrise Operations.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background Facts⁷

Pasha is the parent company to approximately 40 subsidiaries, including Respondent. Tr. 266–267.

The Union represents mariners throughout the U.S. and abroad. Specifically, it has represented Licensed Deck Officers (LDOs) on maritime vessels since approximately 1981 through a series of collective bargaining agreements (CBAs) with Respondent’s predecessor employers, Sealand and CSX. Both Sealand and CSX recognized the Union as the exclusive bargaining representative for its LDOs. GC Exh. 2.

It is undisputed that the following employees constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

Licensed Deck Officers (except where specifically otherwise provided, the term “Licensed Deck Officers” whenever and wherever used in the Master Collective Bargaining Agreement also includes the Master) on U.S. Flag oceangoing vessels.

In 2004, CSX sold its shipping business to Horizon Lines, LLC (Horizon). Horizon also recognized the Union as the exclusive bargaining representative for its LDOs.

Sometime in 2014, Horizon carved out their Hawaii trade lane business – four (4) oceangoing vessels that traveled between California and Hawaii. Horizon’s four vessels were named the Horizon Spirit, the Horizon Enterprise, the Horizon Pacific, and the Horizon Reliance. The Union served as the collective bargaining representative for the LDOs on the Spirit, Enterprise, Pacific and Reliance vessels. By 2015, Horizon sought to sell their Hawaii trade lane business.

It is undisputed that Pasha purchased Horizon’s Hawaii trade lane business – or more succinctly, the four vessels: Horizon Spirit, Enterprise, Pacific and Reliance. To purchase the four vessels, Pasha engaged in an elaborate corporate ownership structure to own these vessels.

⁷ Although I have included record citations to highlight particular testimony or exhibits, my findings and conclusions are not based solely on those specific citations, but rather on my review and consideration of the entire record. The findings of fact are a compilation of credible testimony and other evidence, as well as logical inferences drawn therefrom. In assessing credibility, I have relied primarily on witness demeanor. I also have considered factors such as: the context of the witness’ testimony, the quality of the witness’s recollection, testimonial consistency, the presence or absence of corroboration, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. See *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), *enfd. sub nom.*, 56 Fed.Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all-or-nothing propositions. Indeed, nothing is more common in judicial decisions than to believe some, but not all, of a witness’s testimony. *Daikichi Sushi*, *supra* at 622; *Jerry Ryce Builders*, 352 NLRB 1262, 1262 fn. 2 (2008) (citing *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950), *revd. on other grounds* 340 U.S. 474 (1951)).

Specifically, Pasha created a wholly owned subsidiary, SR Holdings, LLC (SR Holdings), which was formed solely to acquire Horizon's four (4) Hawaii vessels and Horizon's liabilities. SR Holdings has no employees. Tr. 284, 301, see also GC Exh. 3, at 002186.

Horizon entered into a Contribution, Assumption and Purchase Agreement (CAPA) with Pasha, SR Holdings and Respondent. Under this Agreement, Horizon would transfer the vessels to Respondent. Thereafter, SR Holdings, a wholly owned subsidiary of Pasha, would purchase all of the interests in Respondent, including the four vessels, which at some point, Respondent would be acquired by Pasha, its parent company. Tr. 74, GC Exhs. 5–6.

In March and April 2015, prior to the acquisition, Horizon sent a copy of the CAPA and the Disclosure Schedule to the Union. Tr. 74, GC Exh. 4. The CAPA and the Disclosure Schedule specifically informed SR Holdings and Respondent that Horizon was a party to a CBA with the Union. GC Exh. 3, at 002213, GC Exh. 4, at 8.

On April 28, 2015, Horizon informed the Union of the upcoming sale of the Enterprise, Pacific, Reliance and the Spirit to SR Holdings. Horizon also explained to the Union that SR Holdings would purchase the stock of Respondent, and as such, Respondent would be contractually bound to the Union under the CBA as to the LDOs on the four vessels. GC Exh. 5.

That same day, SR Holdings also informed the Union of its upcoming acquisition of the vessels. More importantly, SR Holdings told the Union that *Respondent Sunrise* would be honoring the CBA upon closing of the purchase. GC Exh. 5. Prior to the sale, Respondent never requested a copy of the CBA from the Union. Tr. 87, 307.

On May 26, 2015, approximately three days prior to the sale closing, Horizon sent the Union a copy of the Assignment and Assumption Agreement (AAA) it had with Pasha, SR Holdings and Respondent. Tr. 79, GC Exh. 7. The AAA described all of the parties' duties and obligations under the purchase transaction (CAPA) and who would be responsible for honoring the CBA with the Union (which was Respondent). The AAA also included Schedule A – which was supposed to be a copy of the CBA between Horizon and the Union with all 29 Memoranda of Understanding attached.

When the Union reviewed the AAA, it immediately notified Horizon that Schedule A of the AAA was incorrect, because it was missing several MOUs. Tr. 86. Despite this, however, the Union received assurances from Horizon and George Pasha, President of Pasha, that *Respondent* would assume and abide by the CBA. Tr. 144.

On May 29, 2015, Horizon transferred the Hawaii trade-lane business to Respondent. Tr. 279. It is undisputed that Respondent operates the oceangoing vessels (previously owned by Horizon) transporting goods among the ports of Oakland, CA, Los Angeles, CA and Honolulu, HI.

It is also undisputed that Respondent retained a majority of the LDOs that were represented by the Union when the vessels were owned by Horizon. Tr. 80, 326. In fact, Respondent admits that it recognized the Union as the collective bargaining representative of the LDOs. Tr. 541, GC Exh. 1(cc), at 5.⁸

As such, I find that Respondent is a successor to Horizon because it continued to operate Horizon's Hawaii trade lane business in basically unchanged form, retained all of the LDOs employed by Horizon who were previously represented by the Union, and recognized the Union as the collective bargaining representative of the LDOs. See *Bronx Health Plan*, 326 NLRB 810, 812 (1998), enfd. 203 F.3d 51 (DC Cir. 1999) (successorship can be established even if new owner acquires only a portion of predecessor's business so long as new owner acquires the separate appropriate bargaining unit and that unit comprises a majority of the unit in the new operation), see also *NLRB v. Burns Security Services*, 406 U.S. 272, 281–295 (1972) (employer is a successor employer and must recognize/bargain with the union when: (1) there is substantial continuity between the two enterprises, (2) the successor hired a majority of its employees from the predecessor's employees, and (3) the bargaining unit that existed remains appropriate), and *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 43–54 (1987)).⁹

Returning to the facts of the case, on May 30, 2015, Bill Peterson (Peterson), Vice President of Operations for a company called Pasha Hawaii, emailed the master officers of the Reliance, Pacific, Enterprise and the Spirit informing them that Pasha Hawaii, another subsidiary of Pasha, had acquired their vessels and that it would be assuming the operations of the four container ships. Peterson also informed the masters that another corporation, Crowley Maritime Corporation (Crowley), would provide ship management through its subsidiary, Marine Transport Management, Inc. (MTM). GC Exh. 30.

At this point, it is undisputed that, between March and May 2015, the Union had been told that SR Holdings, Sunrise Operations, and Pasha Hawaii would operate the four containerships that employs their LDO members. It is further undisputed that Pasha was the parent company to all of these entities. Consequently, the Union sought to determine exactly who was the employer of their LDO members on the four vessels? It is this ultimate question, given Respondent's series of corporate ownership transfers, that forms the basis of the information requests at issue in this case.

B. The Information Requests

1. September 19, 2017 Request.

⁸ Respondent also recognized the Union by: (1) complying with the terms and conditions of the CBA, (2) protecting the wages, pension rights, and other economic benefits of the Union's members for the life of each Hawaii vessel, and (3) processing the Union's grievances. Tr. 80–81. At no time during the acquisition or immediately thereafter did Respondent inform employees or the Union that it would be setting its own initial terms and conditions of employment or request to bargain over the MOUs that were not listed in Schedule A. Tr. 81, 88.

⁹ Respondent argues that it is not a successor employer to Horizon. I have addressed that argument in the Discussion and Analysis section set forth below.

On or about September 19, 2017, the Union requested documents from Respondent as to whether Pasha, Pasha Hawaii and Respondent were a single employer. Tr. 155, GC Exh. 13.¹⁰ The Union believed these entities were operating as one employer because: (1) Pasha and Respondent's names were on the CAPA and the AAA as parties to the acquisition of Horizon's four vessels, see GC Exhs. 3, 7; (2) Horizon previously informed the Union that Pasha and Respondent were parties to the sale, see GC Exh. 5; (3) a day after the acquisition, Pasha Hawaii informed the masters of the vessels that it would be operating the Spirit, Reliance, Enterprise, and Pacific, GC Exh. 30; and (4) Pasha Hawaii advertised on its website the name on the side of each vessel as "Pasha." Tr. 179, GC Exhs. 14–17.

Most importantly, Union Vice President Jeremiah Turner (Turner) testified that, because there were so many entities claiming ownership of the vessels and/or that held primary responsibility for the LDOs on the ships, the Union requested documents in order to determine who the employer was.

As such, the Union requested that Respondent provide the following documents, from September 1, 2014 to present, to include any:

- (i) articles of incorporation or charters for the Pasha Group, Pasha Hawaii Holdings, LLC, and Sunrise;
- (ii) bylaws or other similar corporate governance documentation for the Pasha Group, Pasha Hawaii Holdings, LLC and Sunrise;
- (iii) documents reflecting all of the directors and officers of The Pasha Group and Pasha Hawaii;
- (iv) documents reflecting stockholders holding over 10% of stock in the Pasha Group and Pasha Hawaii;
- (v) documents reflecting the familial relationships between any director, officer of major stockholder of The Pasha Group and Pasha Hawaii;
- (vi) organizational charts of the Pasha Group, Pasha Hawaii Holdings, LLC and Sunrise;

¹⁰ Whether Pasha, Pasha Hawaii and Respondent are in fact a single employer is not an issue asserted in the complaint. It is only the Union's belief that formed the basis for its information requests. As such, the single employer issue, and any arguments about the Union's single employer theory, are irrelevant and will not be addressed in this decision.

However, Respondent attached Exhibits A and B to its Brief. These exhibits are correspondence from Region 20 determining whether Respondent, Pasha and Pasha Hawaii are a single employer. Respondent also referred to these exhibits in its Brief at pages 57, 58 and 59. Although the letters were mentioned in Respondent's Petition to Revoke, and my Order Granting in Part and Denying in Part Respondent's Petition, these letters were never produced as part of Respondent's Petition nor introduced into evidence at trial. As such, the General Counsel moved to strike Exhibits A and B and Respondent's references to them in its brief.

In response, Respondent urged that I take judicial notice of these letters since they were referenced in the aforementioned pleadings in the case. However, the fact remains that these letters were not actually introduced into the record. Moreover, the single employer issue is irrelevant to this case. In any event, I decline to take after-the-fact judicial notice of Exhibits A and B since these exhibits were never offered as part of the record, nor were they introduced into evidence at trial and are irrelevant to this complaint. Accordingly, I grant the General Counsel's motion to strike as to Exhibits A and B and strike the references to them at the last sentence on page 57, the first sentence on page 58 and the second full sentence on page 59 in Respondent's brief.

- (vii) documents reflecting the business locations of the Pasha Group, Pasha Hawaii Holdings, LLC and Sunrise;
- (viii) invoices reflecting any common customers or vendors of The Pasha Group, Pasha Hawaii and Sunrise;
- 5 (ix) employee handbooks and employee policies for LDOs working on vessels owned, in whole or in part, by The Pasha Group or Pasha Hawaii;
- (x) documents reflecting the benefits plans offered to LDOs employed or working on vessels owned, in whole or in part, by The Pasha Group or Pasha Hawaii;
- 10 (xi) applications or hiring documents for LDOs employed by or working on any vessels owned, in whole or in part, by The Pasha Group or Pasha Hawaii;
- (xii) documents showing loans between or among The Pasha Group, Pasha Hawaii Holdings and Sunrise operations;
- (xiii) rental or lease agreements between or among The Pasha Group, Pasha Hawaii and Sunrise Operations; documents showing any services, including financial, legal and
- 15 human resources services, rendered by the Pasha Group or Pasha Hawaii;
- (xiv) documents showing any financial arrangements for compensation of services for or rendered by The Pasha Group or Pasha Hawaii; and
- (xv) documents showing whether the Pasha Group, Pasha Hawaii Holdings, LLC and Sunrise have an ownership interest in the vessels Enterprise, Pacific, Spirit and
- 20 Reliance. GC Exh. 13.¹¹

Respondent did not respond to the Union's first request. Tr. 159.

25 For its part, Respondent defended that it did not respond to the Union's first information request, because there was a pending ULP charge filed against it by the Union involving whether Respondent, Pasha and Pasha Hawaii were acting as a single employer. See Case No. 20-CA-202809.

30 2. March 2, 2018 Request.

On March 2, 2018, the Union sent a second request for information which was almost identical to the September 19, 2017 request, except: (1) the March 2 request cited legal cases to support the Union's single employer theory, and (2) the Union removed a request involving the ship management system. Tr. 158, GC Exh. 18.

35 Turner testified that the Union sent Respondent the second request because Respondent had not responded to the Union's September 19 request. Moreover, the Union sought information to support its single employer theory in an upcoming arbitration that would settle the parties' 2017 contract re-opener negotiations. GC Exh. 18.

40 Also, the Union told Respondent that it requested the information in order to determine which entity – Respondent, Pasha or Pasha Hawaii – was obligated to sign the parties' CBA if the parties reached agreement during reopener negotiations. Lastly, according to Turner, who I found credible, the Union needed these documents in order to resolve comments made by Respondent's

45 Senior Vice president of Vessel Operations Ed Washburn (Washburn) during negotiations that

¹¹ I note that Respondent did not become a corporate entity until on or about May 25, 2015.

Pasha, not Respondent, would pick which Union would represent the LDOs on the four vessels. GC Exh. 18, at 2.

It is undisputed that Respondent objected to providing much of the information, particularly involving *Pasha* and *Pasha Hawaii*, and invited the Union to “meet and discuss” the Union’s second request. The Union did not respond to Respondent’s offer to confer. GC Exhs. 19–20.

Despite this, on March 14 and 23, 2018, the Union received a limited response to its second information request. Tr. 160–66, GC Exhs. 19–20. The Union did not receive any documents for request numbers 1–3, 8–10, 13–15 regarding *Pasha* or *Pasha Hawaii*. Tr. 161–164, GC Exh. 19. The Union also did not receive any documents for request numbers 4–7 and 16–17. Tr. 162–165, GC Exh. 19.

3. September 27, 2018 Request.

On September 27, 2018, the Union sent Respondent a third information request asking for an updated fleet roster. The Union sought this information based on a provision in the parties’ CBA (Section 1, Subsection 9(g) – Vessel Listings of the Master CBA) which entitled the Union to discover which LDOs were permanently assigned to job positions on each vessel and whether there were any “open” unassigned positions. Tr. 168, GC Exh. 21.

On October 1, 2018, Washburn was given two versions of the fleet roster. R. Exh. 3. However, Washburn did not turn over the roster to the Union at that time. Although Respondent and the Union met with one another on or about October 30, 2018, neither party mentioned the roster. Respondent did not turn over the roster to the Union during this meeting. Tr. 226–228.

On or around December 4, 2018, two months after receiving the rosters, Washburn realized he never sent the roster to Turner, so on December 4, 2018, Respondent, through counsel, forwarded the roster to the Union. Tr. 495, GC Exh. 22.

After receiving and reviewing the roster, Turner emailed Respondent’s counsel noting “errors” in the roster. R. Exh. 3. It is undisputed that, on December 10, 2018, Respondent, by its counsel, sent Turner a “corrected” fleet roster. R. Exh. 7. It is undisputed that Respondent’s only explanation for the two-month delay was that Washburn forgot to send the roster to the Union in October 2018.

4. October 11, 2018 Request.

On October 11, 2018, the Union sent Respondent a fourth information request inquiring whether Respondent implemented the terms of an August 3, 2018 arbitrator’s decision and award. Tr. 171, GC Exhs. 23–24. Turner testified that the Union specifically sought wage arrearage calculations from Respondent. Turner explained that these calculations were relevant to ensure its members had been/were being properly paid in accordance with the arbitrator’s award. *Id.*

For its part, while Washburn admitted at trial that it had already implemented the terms of the arbitration award within approximately a week of the August 3, 2018 decision, it had not communicated this to the Union at the time of the information request. Moreover, Respondent did

not respond to the Union's information request until December 4, 2018, approximately two months later. Tr. 176, 524–525, GC Exh. 25. According to Washburn, in order to fully respond to the Union's request, Respondent's payroll manager had to obtain the necessary contribution information from the Union's benefit plans administrator then perform the calculations for each of the LDOs who worked aboard the Spirit, Reliance, Enterprise and Pacific during the preceding 17 months. Washburn further testified that it took time to generate the report and verify that the LDOs received accurate pay and benefit contributions (Tr. 73, 309, 497–498, 553).

5. November 7, 2018 Request.

It is undisputed that Union heard rumors that Pasha was constructing two new containership vessels. Turner testified that it was important for the Union to understand what corporate entity would construct these containerships, because: (1) the Union saw press releases from Pasha Hawaii that it was constructing new containership vessels, (2) the Union saw Pasha, Pasha Hawaii and Respondent as one employer, (3) these new vessels would be added to the Hawaii trade lane that Respondent Sunrise/Pasha Hawaii operated, as such, (4) the Union believed its LDO members would likely work on the new vessels, and (5) a provision in the parties' CBA required that the Union ensure that any new vessel construction complied with certain standards and requirements. GC Exh. 2, at 210, GC Exhs 27–29.

Thus, on November 7, 2018, the Union sent its fifth information request to Respondent asking for the sizing requirements for the LDO's quarters on the two new containerships. Tr. 175–176, GC Exh. 26. The Union based its request on Section 5, Subsection 4 – New Construction and Major Reconversion of the Master CBA, which required that the LDOs' quarters be constructed within certain specifications.

When asked why the Union requested information from *Respondent Sunrise* about *Pasha Hawaii's* new containerships (the ships were advertised as being part of Pasha Hawaii, not Respondent), Turner explained that the Union saw Respondent, Pasha and Pasha Hawaii as one employer due to the different corporate entities that the Union was told employed the LDOs. Because of this confusion communicated by representatives of Respondent, Pasha and Pasha Hawaii, the Union did not know which entity was responsible for the four containerships and/or which entity served as the parent company of Respondent Sunrise. As a result, the Union reasonably believed that, ultimately, these two new containerships would be vessels that its LDO members would be employed on.

According to Turner, the Union came to believe that its LDO members would work on the new containerships, because: (1) the new containerships had been mentioned at bargaining meetings between the Union and *Respondent Sunrise*, (2) *Pasha Hawaii's* Vice President of Operations previously told the Union that it was the party operating the Spirit, Reliance, Enterprise and Pacific vessels, (3) the four containerships that its LDO members were employed on and the new containerships being built would have *Pasha's* name on the sides of the ships, (4) all of the containerships were listed on *Pasha Hawaii's* website; and (5) all the press releases issued by *Pasha Hawaii* stated that new containerships would be added to its Hawaii trade-lane. Tr. 176, 179–180, GC Exh. 14–17, 27–30.

Turner opined that, since the Union represented all of the LDOs on the Spirit, Enterprise, Pacific and Reliance, regardless of what entity owned the vessels, the Union reasonably believed

that any containerships being added to the Pasha Hawaii trade-lane would be manned by its LDO members. Tr. 179, GC Exh. 2, at 210. Accordingly, Turner testified that, for the aforementioned reasons, the information concerning the LDOs' quarters was relevant and necessary to further the Union's representation of the LDOs.

In any event, on December 10, 2018, the Union received four different answers to approximately 29 of its requests. Tr. 182, GC Exh. 32. The Union did not receive a response to requests 1–3, 5–20, 23–27 and 29(a)-(c), 29(e)-(h). Tr. 182–183, GC Exh. 32.¹²

C. Repudiation of the 1984 MOU Grievance Arbitration Provision

The parties disagree on the location of where all of the parties' arbitration proceedings will be held. Based on the documentary evidence and the credible testimony of Union General Counsel Gabriel Terrasa (Terrasa), I find as follows:

Within the parties' original 1981 CBA, Section 36 entitled "Grievance Procedure and Arbitration" initially stated that all arbitration proceedings would be held in either New York or San Francisco.

However, on June 16, 1984, Section 36 was amended in an MOU to read, "unless some other place is mutually agreed upon, the grievance proceedings shall be held at the Union Headquarters in Linthicum Heights, Maryland" (1984 MOU) Tr. 105, GC Exh. 2, at 2–3, 185.

¹² Regarding the November 7, 2018 information request, the General Counsel moved to strike portions of the first sentence on page 62 of Respondent's Brief that states, "Despite Sunrise's repeated assurances to the Union that it does not have any technical drawings of the vessels being built by Keppel with the exception of a basic vessel sketch and even after Sunrise produced a letter from Keppel expressly rejecting Sunrise's request to see the blueprint drawings of the new vessels for dissemination to the Union," as well as the third sentence on page 62 that states, "Given that Sunrise does not have access to the technical vessel drawings, coupled with the fact that Sunrise attempted to gain access to these drawings from the third-party who owned the drawings, there can be no real dispute that Sunrise complied with the Act by responding to only those requests to which it had responsive information." As grounds therefore, the General Counsel contends that there are no facts in evidence that "Sunrise's repeated[ly] assur[ed]...the Union that it did not have any technical drawings..." that "Sunrise produced a letter from Keppel expressly rejecting Sunrise's request to see the blueprint drawings of the new vessels..." or that "Sunrise d[id] not have access to the technical vessel drawings" and/or "attempted to gain access...from the third-party who owned the drawings." As such, allowing Respondent's statements to stand would be giving Respondent the ability to introduce facts not in evidence then argue its position therefrom, denying the General Counsel (and the Charging Party Union) due process under Section 102.45(b) of the Board's Rules and Regulations. See also *Today's Man*, 263 NLRB 332, 333 (1982). Respondent objected to striking these sentences, citing the Board's decision in *Cintas Corp.*, 353 NLRB 752, 756 (2009), arguing that all of its statements are legal argument which it is entitled to do in its brief.

However, Respondent's reliance on *Cintas* is misplaced. In *Cintas*, the Board refused to strike certain portions of the Union's brief, because the Board found the Union's statements constituted a legal argument since the statements in the Union's brief drew conclusions from certain facts *already in evidence*. Id at 756. However, in this case, Respondent never elicited testimony or introduced evidence *in the record* that "Sunrise repeated[ly] assur[ed]...the Union that it did not have any technical drawings..." that "Sunrise produced a letter from Keppel expressly rejecting Sunrise's request to see the blueprint drawings of the new vessels..." or that "Sunrise d[id] not have access to the technical vessel drawings" and/or "attempted to gain access...from the third-party who owned the drawings." Thus, Respondent cannot draw conclusions from these facts as legal argument when the aforementioned facts were never introduced into evidence. Accordingly, I agree with the General Counsel that the aforementioned sentences in Respondent's brief must be struck.

Terrasa testified that Respondent knew that the parties' arbitration proceedings were to be held at the Union's headquarters in Linthicum Heights, MD because it previously met with the Union for two different arbitrations in Linthicum Heights: one on April 26, 2018, see GC Exh. 9, and the second on July 26, 2018. Tr. 97, 101–102; GC Exhs. 10–11.

Terrasa further testified that, at the April 26, 2018 arbitration, Respondent admitted into evidence as a joint exhibit the CBA which included the 1984 MOU. Tr. 100, GC Exh. 10. I found Terrasa's testimony credible on this point as record evidence corroborated his testimony. GC Exhs. 10–11.

Nevertheless, it is undisputed that, in or around September 14, 2018, Respondent's counsel informed the Union that the parties' upcoming arbitration should be held in San Francisco, CA, not Linthicum Heights, MD. Respondent based its argument on Section 36 of the parties' original 1981 CBA. Tr. 103, GC Exh. 12, at 256.

To that end, Washburn testified that the 1984 MOU was not included in the AAA from Horizon, and as such, Respondent never agreed to change the arbitration location from New York/San Francisco to Linthicum Heights, MD. Tr. 547. According to Washburn, since Respondent never signed the 1984 MOU formally agreeing to the location change, the parties' 1981 CBA was the applicable CBA governing the issue, which stated that all arbitrations were to be held in San Francisco (since it involved west coast vessels). GC Exh. 2, at 1–2, 4, GC Exh. 12, at 256.

However, I do not find Washburn's testimony credible on this point. Specifically, I note that, on cross examination by counsel for the Charging Party, Washburn could not explain why, despite Respondent not having, seeing or recognizing the 1984 MOU, Respondent admittedly implemented all of the pay procedures and the 401(k) provisions contained therein. Tr. 107–108, GC Exh. 2, at 182–189.¹³ Washburn stammered and evaded answering Charging Party counsel's question until, ultimately, he admitted that the pay procedures and the 401(k) provisions from the parties' 1984 MOU were implemented.

Moreover, Terrasa testified that, immediately prior to the acquisition, he personally told Respondent's General Counsel Amy Jacob (Jacob) about the missing MOUs, and after Respondent acquired Horizon's Hawaii trade lane business, Terrasa gave a copy of the complete CBA with all of the MOUs to Respondent during the parties' reopener negotiations on July 11, 2017. Tr. 89. Respondent never objected to any of the provisions in the CBA during these negotiations.

¹³ Washburn was articulate, open and very descriptive in his answers to questions posed by Respondent's counsel, but on cross examination by counsel for the General Counsel, and especially with counsel for the Union, his answers were short, direct, extremely vague, one-to-two-word answers. I also note that Washburn's testimony was so vague, counsel for the Union had to continually restate and rephrase her questions in order to pull answers from Mr. Washburn.

I also found Washburn's testimony disingenuous at best. Specifically, when I asked him whether he was employed by Pasha, he remarked "he didn't know." I find it incredible that the Vice President of Operations (or anyone for that matter) would not know by whom he is employed. Overall, Washburn's appearance left me with the impression that he was committed to sharing as little information as possible unless it benefited Respondent, and accordingly, except where noted in this decision, I found Washburn's entire testimony less than fully credible.

Lastly, as stated earlier in this decision, Washburn himself asked for and the Union gave him a copy of the complete CBA with all of the MOUs (including the June 1984 MOU) on September 1, 2017. Tr. 542–544, GC Exh. 8.

Accordingly, I find that the location of arbitration proceedings was/is governed by the parties' 1984 MOU. I also find that Respondent was given a copy of the 1984 MOU prior to September 2018. While Respondent may not have signed the 1984 MOU, I conclude that Respondent demonstrated its awareness of the 1984 MOU and its knowledge of location of arbitration proceedings by previously meeting with the Union for arbitration proceedings in Linthicum Heights, MD and by complying/implementing the pay procedures and financial provisions contained within the 1984 MOU.

Therefore, according to the parties 1984 MOU, I find that all arbitrations, including the September 2018 arbitration, are to be held at the Union's headquarters in Linthicum Heights, MD.

DISCUSSION AND ANALYSIS

After reviewing all of the evidence, I conclude that:

I. RESPONDENT VIOLATED SECTIONS 8(A)(5) AND (1) OF THE ACT WHEN IT FAILED/REFUSED TO FURNISH AND/OR UNREASONABLY DELAYED IN FURNISHING NECESSARY AND RELEVANT INFORMATION REQUESTED BY THE UNION

A. Legal Standard

Each party to a bargaining relationship is required to bargain in good faith. See Section 8(a)(5) of the Act. Part of that obligation is that both sides are required to furnish relevant information upon request. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). This duty is statutory and exists regardless of whether there is a collective-bargaining agreement between the parties. *American Standard*, 203 NLRB 1132 (1973).

The employer's duty to provide relevant information exists because without the information, the union is unable to perform its statutory duties as the employees' bargaining agent. Thus, "[t]he refusal of an employer to provide a bargaining agent with information relevant to the Union's task of representing its constituency is a *per se* violation of the Act" without regard to the employer's subjective good or bad faith. *Brooklyn Union Gas Co.*, 220 NLRB 189, 191 (1975); *Procter & Gamble Mfg. Co.*, 237 NLRB 747, 751 (1978), *enfd.* 603 F.2d 1310 (8th Cir. 1979).

Information concerning employees in the bargaining unit and their terms and conditions of employment, is deemed "so intrinsic to the core of the employer-employee relationship" to be presumptively relevant. *Disneyland Park*, 350 NLRB 1256, 1257 (2007); *Sands Hotel & Casino*, 324 NLRB 1101, 1109 (1997). Presumptively relevant information must be furnished on request to employees' collective-bargaining representatives unless the employer establishes legitimate affirmative defenses to the production of the information. *Metta Electric*, 349 NLRB 1088 (2007); *Postal Service*, 332 NLRB 635 (2000).

However, when the requested information does not concern subjects directly pertaining to the bargaining unit, such material is not presumptively relevant. Under those circumstances, the

burden is upon the union to demonstrate the relevance of the material sought. *Disneyland Park*, supra, at 1257; *Richmond Health Care*, 332 NLRB 1304, 1305 fn. 1 (2000). To show relevance, the union must demonstrate that it had “a reasonable belief supported by objective evidence for requesting the information.” *G4S Secure Solutions (USA)*, 369 NLRB No. 7, at 2 (2020); see also, *Shoppers Food Warehouse*, 315 NLRB 258, 259 (1994).

Suspicion alone is not enough, and an articulation of general relevance is insufficient. *G4S Secure Solutions*, supra (citations omitted). “Whether a union has gone beyond ‘mere suspicion’ to show relevance is a factual question to be decided on a case-by-case basis.” *Id.*, see also *Postal Service*, 310 NLRB 701, 702 (1993). Rather, the Union must demonstrate an objective factual basis for believing the requested information is relevant, unless the relevance of the information should have been apparent to the employer under the circumstances. *Disneyland Park*, supra at 1258. A “liberal, discovery-type standard” to determine relevance is used, and the Union’s burden to establish the relevance of their information requests is “not exceptionally heavy.” *A-1 Door & Building Solutions*, 356 NLRB 499, 500 (2011).

B. Analysis

1. September 19, 2017 and March 2, 2018 requests.

Complaint paragraph 8(a)-(e) allege that Respondent failed/refused to furnish and/or unreasonably delayed in furnishing information to the Union as to requests 3 – 7, 11 – 15 or failed to furnish information regarding Pasha and Pasha Hawaii as to request 1 – 2, and 8 – 10.

Requests 3-7 and 11-15 ask for documents that, on their face, do not directly concern subjects pertaining to the bargaining unit. Thus, the Union must establish relevance. However, I conclude the Union has satisfied its burden of relevance.

Specifically, the Union requested these documents, because it was told, by Horizon that SR Holdings and Respondent would own the four vessels and thus have direct responsibility over the LDOs that the Union represented. Subsequently, the Union received the acquisition documents, which revealed that Horizon’s trade lane business would be bought by SR Holdings, who then would transfer ownership to Respondent, who was a subsidiary of Pasha. Then, after the acquisition, Pasha Hawaii’s Vice President of Operations informed the Union that it would have primary ownership responsibility of the four vessels, and as such, would be the primary employer for the LDOs that the Union represented.

Thus, I find that the acquisition documents, Pasha and Pasha Hawaii themselves provided the Union with its belief that any of these entities could be the employer for the LDOs that the Union represented. Accordingly, I conclude that the Union’s request for the aforementioned documents was relevant to determine who was the employer for the LDOs on the four vessels the Union represented. Respondent had an obligation to provide this information to determine whether Pasha and/or Pasha Hawaii were the employer to the LDOs (since it created the confusion regarding who owned the four vessels), and its failure to furnish these documents violated Sections 8(a)(5) and (1) of the Act.

Similarly, Requests 1, 2, and 8–10 sought information concerning the ownership/corporate relationship between Respondent, Pasha and Pasha Hawaii. Again, these documents are relevant

because the Union was informed by Horizon, SR Holdings, Pasha and Pasha Hawaii themselves that SR Holdings, Respondent, Pasha and Pasha Hawaii may all be the owners of the four vessels and/or may be the employer to the LDOs on the vessels. The Union was entitled to know the employer to the LDOs they represented, and therefore, had a reasonable belief based on objective
 5 factual evidence for requesting documents to determine exactly who would be the employer obligated to the parties' CBA. Respondent's failure to provide these documents as to it, Pasha and Pasha Hawaii violated the Act as alleged.

Respondent claims, as its affirmative defense, that the September 19, 2017 and March 2,
 10 2018 information requests are untimely because they fall outside of the 10(b) period. GC Exh. 1(cc) at 12. Section 10(b) of the Act prohibits the Board from issuing a complaint based on allegations that did not occur within six months of the filing of the ULP charge. 29 U.S.C. §160.

The record reveals that the Union filed its first ULP charge (regarding the September 19, 2017 and the March 2, 2018 requests) on May 2, 2018. GC Exh. 1(a). The six-month period for
 15 issuing a complaint on this charge began on December 2, 2017. However, the 10(b) period does not start when the Union first issued its information request. Rather, it began to run when the Union received actual or constructive notice of the unlawful conduct that constitutes the alleged unfair labor practice. See *Vanguard Fire & Security Systems*, 345 NLRB 1016, 1016 (2005), enfd. 468 F.3d 952 (6th Cir. 2006); *Allied Production Workers Local 12*, 337 NLRB 16, 18 (2001) (finding
 20 that the 6-month period provided by Section 10(b) begins to run only when a party has "clear and unequivocal notice" of the unfair labor practice). The burden of showing such clear and unequivocal notice is on the party raising Section 10(b) as an affirmative defense – or in this case Respondent. See *Dedicated Services*, 352 NLRB 753, 759 (2008); *A & L Underground*, 302 NLRB 467, 469 (1991).

Even assuming, *arguendo*, that the Union had "clear and unequivocal notice" that
 25 Respondent did not intend to respond to its September 19, 2017 request, Respondent cannot show that the March 2, 2018 information request, which is practically identical to the September 19, 2017 information request, was untimely. In fact, the Union's March 2, 2018 request falls well
 30 within the 10(b) period for the ULP charge that was filed on May 2, 2018. Respondent's untimeliness argument has no merit.

Respondent also argues that it was prohibited from timely turning over the documents responsive to the September 2017/March 2, 2018 requests since it was defending an ULP charge
 35 filed by the Union alleging that Respondent, Pasha and Pasha Hawaii were acting as a single employer. Thus, turning over the documents, Respondent contends, would be tantamount of unlawful pretrial discovery. See *Offshore Mariners United*, 338 NLRB 745, 746 (2002); and *David R. Webb Co.*, 311 NLRB 1135 (1993) (no pretrial discovery of documents allowed in Board proceedings).

However, the Board has rejected Respondent's argument on this point. See *National Broadcasting Company, Inc.* 352 NLRB 90, 101 (2008) citing *Dodger Theatricals Holdings, Inc.*, 347 NLRB 953, 967 (2006) (Board found information requested by the union relevant to employer
 40 single employer status and ordered it to be turned over to union without being considered pretrial discovery – the fact that the union filed its arbitration request regarding single employer status, and the case had been scheduled for arbitration did not "change the nature and relevancy of the union's information request."), see also *Kellogg's Snack*, 344 NLRB 756, 760 (2005) (ALJ, affirmed by Board, required information to be turned over, even though some of the same

information was subpoenaed by union in an arbitration proceeding). As such, despite that Respondent and the Union were involved in an ULP matter concerning the same information the Union requested be turned over, Respondent was nevertheless required to timely furnish the documents. It did not.

Accordingly, Respondent violated the Act as to the Union's September 19, 2017 and March 2, 2018 information requests.

2. September 27, 2018 request.

Complaint paragraph 9(a) alleges that Respondent unreasonably delayed in furnishing the Union with an updated fleet roster showing which LDOs were permanently assigned to positions on the Spirit, Reliance, Enterprise and Pacific and how many available positions there were on the four vessels operated by Respondent. I find that the Union's request for the aforementioned roster was directly relevant to its representation of the LDOs since the parties' CBA specifically entitled the Union to this information. See GC Exhs. 2, 21, see also *Disneyland Park*, 350 NLRB 1256, 1257 (2007); *Sands Hotel & Casino*, 324 NLRB 1101, 1109 (1997) (documents concerns bargaining unit employees and their terms and conditions of employment is presumptively relevant and must be timely furnished to the Union).

Respondent ultimately furnished this information albeit delayed by two months. However, the Board has held that a two-month delay in furnishing relevant information violates Section 8(a)(5) of the Act. See *Overnight Transportation Co.*, 330 NLRB 1275 (2000) (an employer is required to furnish relevant information requested by the Union in a timely fashion); see also *Postal Service*, 310 NLRB 530, 536 (1993) (two-month delay excessive); *Postal Service*, 308 NLRB 547, 550 (1992) (five-week delay excessive).

Further, Respondent's reason for the two-month delay, Washburn forgot to turn the document over, failed to justify the delay. See *Postal Service*, 359 NLRB 56, 58 (2012) (one-month delay absent evidence justifying delay unreasonable); *Postal Service*, 308 NLRB 547, 551 (1992) (four-week delay unreasonable); *International Credit Service*, 240 NLRB 715, 718-719 (1979), *enfd.* in relevant part 651 F.2d 1172 (6th Cir. 1981) (six-week delay unreasonable); *Monmouth Care Center*, 354 NLRB 11, 52 (2009), *enfd.* 672 F.3d 1085 (D.C. Cir. 2012) (six-week delay unreasonable).

Thus, I conclude that Respondent violated the Act regarding the Union's September 27, 2018 request.

3. October 11, 2018 request.

The General Counsel contends in Complaint paragraph 9(c) that Respondent unreasonably delayed in providing the Union with documents confirming that it implemented an August 3, 2018 arbitrator's award. The Union's request for this information is directly relevant to its representation of the LDOs since the information sought would assure the Union that Respondent properly calculated and implemented wage arrearages owed to the LDOs. *Disneyland Park*, *supra*, *Sands Hotel & Casino*, *supra*.

Again, Respondent's two-month delay in furnishing this information violates the Act unless there is evidence justifying the delay.

Here, Respondent defends the delay by arguing that Washburn “had been traveling almost non-stop and [Respondent] had...a host of competing priorities.” However, other than Respondent’s statement, Respondent provided no evidence to support its rationale regarding the delay. Moreover, even assuming Respondent’s delay was justifiable, which I do not find, it failed to immediately inform the Union, at the time of the request, that there would be a delay or communicate to the Union the reasons therefor. Rather, Respondent simply delayed for two months in providing the Union with the requested information and its reasons for the delay.

Nevertheless, the Board has rejected these types of delayed justifications. See *E.I. Du Pont De Nemours & Co. & Amptill Rayon Workers, Inc., Local 992, Int’l Bhd. of Du Pont Workers*, 366 NLRB No. 178 (2018) (employer’s seven month delay in providing information violated the Act, because: (1) the employer failed to provide any explanation or argument justifying the delay, (2) when the employer proffered an after-the-fact explanation for the delay, the Board found no evidence to support the explanation, and (3) the employer “never once” requested an extension of time or to narrow the scope of the request).

Accordingly, I conclude Respondent violated the Act as to the Union’s October 11, 2018 request.

4. November 7, 2018 request.

Lastly, complaint paragraph 9(b) alleges that Respondent failed to furnish information about the sizing requirements for the LDO’s quarters on two new containerships that the Union believed its LDO members would operate. I find the Union’s request for this information from Respondent directly relevant as a term/condition of employment, because the parties’ CBA entitled the Union to this information. See GC Exh. 26.

Respondent contends that the information requested by the Union is irrelevant, and thus not required to be furnished, because the new containerships were being built and operated by *Pasha Hawaii* not *Respondent*. However, I find that the Union had a reasonable belief based on objective factual evidence for seeking these documents from *Pasha Hawaii*.

Specifically, the record reveals that: (1) the Union was first told by *Respondent* at reopener negotiations about the new containerships, (2) the four containerships that the LDO members were employed on and the new containerships being built would have *Pasha*’s name on the sides of the ships, (3) all of the containerships, including the new vessels, were listed on *Pasha Hawaii*’s website; (4) *Pasha Hawaii*’s Vice President of Operations previously told the Union that it maintained ownership over the four vessels (Spirit, Enterprise, Pacific and Reliance) in the Hawaii trade lane and would be primarily responsible for employing the LDOs, and (5) all the press releases issued by *Pasha Hawaii* stated that new containerships would be added to its Hawaii trade-lane. As such, the Union had a reasonable objective factual basis, based on the differing information told to it by representatives of Respondent, *Pasha*, and *Pasha Hawaii*, to inquire which employer entity would operate the two new containerships. Moreover, since *Pasha Hawaii*, through its own press releases, notified the Union that the new containerships would be added to the Hawaii trade lane business, the Union had an objective factual basis on which to conclude its LDOs would man the new vessels.

Therefore, since the new containerships would be built under the banner of either Respondent, Pasha, or Pasha Hawaii, I find the Union's November 7, 2018 request for information concerning the sizing of the LDOs' quarters on the new containerships relevant and necessary. Respondent was obliged to furnish this information to the Union, and when it did not as to itself, Pasha and Pasha Hawaii, Respondent violated Section 8(a)(5) and (1) of the Act.

C. Respondent's Affirmative Defenses to Furnishing the Requested Information

In addition to its arguments that were specific to the information requests, Respondent asserted several other affirmative defenses to this complaint. However, as detailed below, all of these defenses are meritless.

Respondent first contends that it is not a successor employer to Horizon since it only acquired 30 percent of Horizon's assets. However, the Board dismissed this argument to successorship in *Bronx Health Plan*, 325 NLRB at 812, and as such I have determined that Respondent is a successor employer to Horizon. See Findings of Facts, at 4–5, *supra*.

Next, Respondent, for the first time in this case, challenges the appropriateness of the LDOs as a bargaining unit. Specifically, Respondent claims that the LDOs are supervisors under Section 2(11) of the Act. In fact, both parties dedicate a large portion of their briefs to addressing this issue. See R. Br. at 32–54; see also Tr. 516, R. Exhs. 1, 5; GC Br. at 9–11.

Specifically, Respondent argues all LDOs – the master, chief/first, second and third mate officers – are supervisors within Section 2(11). While it appears that the General Counsel concedes that the master mate officer is a supervisor, counsel for the General Counsel nevertheless contends that the second and third mate officers are employees, not supervisors under Section 2(11). Both parties cite to various Board precedent to support their respective positions.

Individuals are statutory supervisors under Section 2(11) of the Act if: (1) they hold the authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, discipline other employees, responsibly direct them, adjust grievances or effectively recommend such action; (2) their “exercise of such authority is not...merely routine or clerical nature, but requires the use of independent judgment;” and (3) their authority is held “in the interest of the employer.” 29 U.S.C. Section 152, see also *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 713 (2001) citing *NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. 571, 573–574 (1994). In this case, Respondent carries the burden of proving supervisory status. See *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1047 (2003).

Even if I conclude that the master mate officer is a supervisor under the Act (since s/he, inter alia, recommends/issues discipline, hires/fires LDOs, can transfer/lay off/suspend, promote LDOs, schedule/recall/rehire/assign work to/grant time off and respond to leave requests LDOs), I find, and the record clearly establishes, that Respondent's second and third mate LDOs are not supervisors within Section 2(11) as the evidence reveals they have no authority to hire/fire, discipline or recommend discipline, transfer, lay off, promote or suspend, schedule, reschedule, recall or assign any LDOs. Tr. 348–351, 400–402.

Respondent argues that second and third mate officers are supervisors when they serve as Officers of the Watch (OWW). However, the Board, in *Chevron Shipping Co.*, 317 NLRB 379,

380 (1995), determined that LDOs are not supervisors when serving as OWWs. Specifically, the Board found that while OWWs are

responsible for directing the unlicensed employees, assigning tasks, and ensuring the safety of the ship and its cargo...their use of independent judgment and discretion is circumscribed by the master's standing orders, and the Operating Regulations, which require the watch officer to contact a superior officer when anything unusual occurs or problems occur.

Id at 381. As such, I conclude that OWW duties are more of a routine versus supervisory nature since “the duties of the crewmembers, both licensed and unlicensed, are delineated in great detail in the Regulations; thus, the officers and crew generally know what functions they are responsible for performing and how to accomplish such tasks.” Id.

Respondent also asserts that second and third mate LDOs are supervisors because they can evaluate whether an unlicensed officer is competent to stand watch and discipline them accordingly. However, Respondent failed to proffer any examples in the record that *their* second and third mate LDOs perform these functions. Moreover, even if Respondent had offered such evidence, it would not turn second and third mate LDOs into supervisors since the determination that a fellow officer is incompetent and/or insubordinate on duty would be so obvious and egregious that “little [supervisory] independent judgment is needed.” *Chevron Shipping Co.* supra at 381.

Moreover, Respondent’s own disciplinary records show that only the Master, Chief Mate and Chief Engineer ever issued letters of warnings to officers. GC Exh. 33. While Respondent offered an instance where a Master fired a Chief Mate, the record reveals that the Master consulted with his superiors before issuing discipline. Tr. 519.

Respondent’s argument that its LDOs are supervisors is further undermined by its own Safety Management Administration policies which dictate that the Master evaluates the Second and Third Mates, while the Chief Mate is responsible for personnel supervision. R. Exh. 5, at SO_001488 and SO_001522. Neither of these job duties are listed under the second and third mates’ job responsibilities. R. Exh. 5, at SO_001523 – SO_001528.

Respondent also solicited testimony describing a myriad of job functions that, it contends, require a LDO to demonstrate independent supervisory judgment (i.e., situations where the OWW enters or leaves port, what to do when the vessel is in heavy traffic, navigating the vessel in inclement weather, how to handle an actual/potential threat to the vessel’s safety, coordinating abandon ship drills, lifeboat inspections, processes for typing up vessels).

However, the evidence reveals that none of these tasks require independent judgment since the LDOs either must: 1) follow the Master’s established orders or seek clarification from the superior on duty on handling any particular situation, or (2) adhere to the established protocols found in Respondent’s Safety Management Administration policies. See Tr. 342, 347, 395–396, 398, R. Exh. 5, at SO_001350, SO_001596, and SO_001652, see also *In re Oakwood Healthcare, Inc.* 348 NLRB 686, 693 (2006)(a judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective bargaining agreement”), *J.C. Brock Corp.*, 314

NLRB 157, 158 (1994) (quoting *Bowne of Houston*, 280 NLRB 1222, 1223 (1986)) (“[T]he exercise of some supervisory authority in a merely routine, clerical, perfunctory, or sporadic manner does not confer supervisory status.”).¹⁴

Respondent also offered Washburn’s testimony as to his knowledge as to whether Respondent’s LDOs are supervisors. Tr. 516. However, I accord Washburn’s testimony very little weight since it constitutes mainly opinion evidence. In fact, Washburn has no independent or expert knowledge regarding the supervisory status of Respondent’s LDOs much less Section 2(11)’s standards for evaluating one’s supervisory status. Simply put, Respondent has failed to show that its LDOs are supervisors under the Act.

Accordingly, I find the evidence clearly shows that Respondent’s second and third mate officers perform duties that are routine in nature and do not perform any supervisory functions as set forth in Section 2(11) of the Act. As a result, I conclude that the Board retains jurisdiction over this matter as Respondent’s second and third LDOs are employees under the Act and form an appropriate bargaining unit.

Lastly, Respondent argues that the Board lacks jurisdiction in this matter because the Union was never certified as a Section 9(a) representative for the LDOs. However, as counsel for the General Counsel argues in her brief, Section 9(a) certification through the Board is not the only way the Union can become the exclusive bargaining representative of a bargaining unit. See *Barrington Plaza & Tragniew, Inc.*, 185 NLRB 962, 963 (1970), *enfd.* in part 470 F.2d 669 (9th Cir. 1972)(Board noted that the requisite proof of majority status need not take the form of a Board certification or card showing. [T]he existence of a prior contract...raises a dual presumption...that the union was the majority representative at the time the contract was executed, and a presumption that its majority continued at least through the life of the contract. Such a presumption applies...even in a successorship situation).

In this case, the evidence overwhelmingly demonstrates that the Union was the exclusive bargaining representative for the LDOs. Specifically, the record reveals that the Union had a series of CBAs with Respondent’s predecessor employer CSX, Sealand and Horizon. Each of

¹⁴ In an effort to prove that Respondent’s LDOs are supervisors, Respondent’s brief at footnote 10 states, “The autopilot feature in no way diminishes the Officer of the Watch’s supervision of the helmsman, as the Officer of the Watch must still instruct the helmsman on which course to take.” R. Br. at 23–24, fn. 10. Respondent also referenced a link to a newspaper article involving a separate containership which has no relation to this case and was not introduced in evidence. *Id.*

The General Counsel moved to strike the aforementioned language and the link in footnote 10 since neither the statement nor the link are factual assertions that were introduced into evidence at trial.

Respondent objected to striking the language and the link to the newspaper article on the grounds that: (1) the statement was a summary of witness’ testimony, (2) I should construe the statement as its argument, not a factual assertion, and (3) I should take judicial notice of the link to the newspaper article. While I will construe Respondent’s statement as its argument summarizing other witness’ testimony in the record about the autopilot feature (which purportedly goes to bolter Respondent’s argument that the LDOs are supervisors), I agree with the General Counsel that the link referencing another containership is irrelevant to the matters in this case. Moreover, the link to the newspaper article was never introduced into the record at trial.

Accordingly, I will treat Respondent’s sentence in footnote 10 at page 24, beginning “The autopilot feature” and ending “on which course to take” as its argument. The General Counsel’s motion to strike is denied on this point. However, the link to the newspaper article and the article itself is struck.

Respondent's predecessors recognized the Union as the exclusive bargaining representative for the LDOs.

More importantly, Respondent itself admitted that it recognized the Union as the exclusive collective bargaining representative for the LDOs and it never gave any indication to the Union that it believed the Union lost the majority support of its membership. Rather, I agree with counsel for the General Counsel that "Respondent cannot now claim that the Union is not the Section 9(a) representative of the LDOs simply because the Union never sought certification when it had already been recognized by numerous employers, Respondent included." See GC Br. at 26. Accordingly, I find Respondent's argument on this point is without merit and that the Board has jurisdiction over this matter.

II. RESPONDENT VIOLATED SECTIONS 8(A)(5) AND (1) OF THE ACT BY FAILING TO BARGAIN IN GOOD FAITH WITH THE UNION WHEN, SINCE SEPTEMBER 14, 2018, IT REFUSED TO CONTINUE TO MEET FOR ARBITRATION PROCEEDINGS AT THE UNION'S HEADQUARTERS IN LINTHICUM HEIGHTS, MARYLAND AS STATED IN THE PARTIES' MEMORANDUM OF UNDERSTANDING DATED JUNE 16, 1984.

A. Legal Standard

Section 8(a)(5) and 8(d) of the Act defines the obligation of employers to bargain collectively as the "obligation . . . to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment." The obligation to bargain in good faith also extends to bargaining over the location of where the parties will meet and confer.

B. Analysis

Complaint paragraphs 10(a) – (c) charge that, since September 14, 2018, Respondent stopped meeting, and failed to continue to meet, for all arbitration proceedings at the Union's headquarters in Linthicum Heights, MD as set forth in Section 36 of the parties' 1984 MOU. I agree.

The record clearly demonstrates that the parties' 1984 MOU, which amended the parties' CBA, governed where arbitration proceedings would be held: Linthicum Heights, MD. Although Respondent argued that the 1984 MOU was inapplicable because it did not agree to it when it acquired Horizon's Hawaii trade lane business, the evidence shows otherwise.

In fact, Respondent knew about the parties' 1984 MOU and was aware that arbitration proceedings were to be held at the Union's headquarters in Linthicum Heights, MD, because the evidence shows Respondent received a copy of the 1984 MOU after it acquired Horizon's Hawaii trade lane business. In fact, Respondent attended *two* prior arbitrations at the Union's headquarters in Linthicum Heights, MD and never objected to the venue at that time. Furthermore, Respondent complied with the terms of the 1984 MOU when it implemented certain pay and benefits protocols within the 1984 MOU.

The fact is, Respondent does not get to pick and choose which provisions of the MOU it favors while disfavoring other provisions it dislikes. Respondent knew all along that arbitrations were to be held at the Union's headquarters in Linthicum Heights, MD; and as such, when it failed

to continue meeting and conferring with the Union there, it failed to bargain in good faith with the Union in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. Respondent Sunrise Operations, LLC, a wholly owned subsidiary of the Pasha Group, is an employer within the meaning of Sections 2(2), (6) and (7) of the Act.

2. By refusing to provide and/or unreasonably delaying in furnishing necessary and relevant information to the Union, Respondent violated Sections 8(a)(5) and (1) of the Act.

3. Respondent also violated Sections 8(a)(5) and (1) of the Act when it failed/refused to bargain in good faith with the Union by refusing to continue to meet for arbitration proceedings at the Union's headquarters in Linthicum Heights, Maryland as stated in the parties' Memorandum of Understanding dated June 16, 1984.

4. The unfair labor practices committed by Respondent affect commerce within the meaning of Sections 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent failed/refused to provide and/or unreasonably delayed in furnishing necessary and relevant information to the Union, Respondent shall be required to provide this information, as specified in the proposed Order below.

Since Respondent has not clearly delineated and, by its corporate ownership structure, has confused the Union as to whether Respondent, Pasha Group and/or Pasha Hawaii operates as the employer to the Union's LDO members, Respondent shall post a notice at its offices and places of business in Charlotte, NC and San Rafael, CA.

Respondent is also ordered forthwith to meet and confer/bargain in good faith with the Union, as the exclusive representative of the employees in the appropriate unit concerning all terms and conditions of employment, at arbitration proceedings at the Union's headquarters in Linthicum Heights, MD.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁵

ORDER

Respondent Sunrise Operations, LLC, a wholly owned subsidiary of the Pasha Group, its officers, agents, successors, and assigns, shall:

¹⁵ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

1. Cease and desist from:

- 5 a) Failing/refusing to and/or unreasonably delaying in furnishing necessary and relevant requested information made by the Union in order for the Union to perform its duties as the exclusive collective-bargaining representative of the following unit of employees:

10 Licensed Deck Officers (except where specifically otherwise provided, the term “Licensed Deck Officers” whenever and wherever used in the Master Collective Bargaining Agreement also includes the Master) on U.S. Flag oceangoing vessels.

- 15 b) Failing/refusing to meet and confer with the Union for arbitration proceedings at the Union’s headquarters in Linthicum Heights, MD in accordance with Section 36 of the parties’ 1984 MOU to the master Collective Bargaining Agreement.

- 20 c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

- 25 a) Provide the Union with a copy of all documents responsive to its September 19, 2017 and March 2, 2018 requests 3 – 7, 11 – 15 and documents responsive to requests 1 – 2 and 8 – 10 as to Pasha and Pasha Hawaii.

- 30 b) Provide the Union with a copy of all documents responsive to its November 7, 2018 requests which asked for the sizing requirements for the LDO’s quarters on two new containerships that were being built and/or operated by Respondent, Pasha Group and/or Pasha Hawaii.

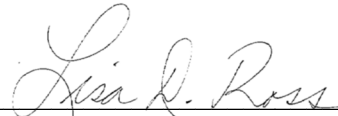
- 35 c) Continue to meet and confer with the Union for arbitration proceedings at the Union’s headquarters in Linthicum Heights, MD as set forth in Section 36 of the parties’ 1984 MOU to their master Collective Bargaining Agreement unless otherwise agreed to by the parties.

- 40 d) Within 14 days after service by the Region, post at its Charlotte, North Carolina and San Rafael, California places of business copies of the attached notice marked “Appendix”¹⁶ in both English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by Respondent’s authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an

¹⁶ If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the businesses involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by Respondent at any time since May 2, 2018.

Dated, Washington, D.C. May 11, 2020

A handwritten signature in cursive script, reading "Lisa D. Ross", is written over a horizontal line.

Lisa D. Ross
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

**Posted by Order of the
National Labor Relations Board
An Agency of the United States Government**

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT fail/refuse to furnish or unreasonably delay in furnishing the Union with relevant information it requests in order to perform its duties as the exclusive collective-bargaining representative of the following unit of employees:

Licensed Deck Officers (except where specifically otherwise provided, the term “Licensed Deck Officers” whenever and wherever used in the Master Collective Bargaining Agreement also includes the Master) on U.S. Flag oceangoing vessels.

WE WILL NOT fail/refuse to meet and confer with the Union for arbitration proceedings at the Union’s headquarters in Linthicum Heights, MD as set forth in Section 36 of the parties’ 1984 MOU to their master Collective Bargaining Agreement unless otherwise agreed to by the parties.

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed to you by Section 7 of the Act.

WE WILL provide the following requested information to the Union forthwith:

- a) all documents responsive to its September 19, 2017 and March 2, 2018 requests 3 – 7, 11 – 15 and documents responsive to requests 1 – 2 and 8 – 10 as to Pasha and Pasha Hawaii.
- b) Provide the Union with a copy of all documents responsive to its November 7, 2018 requests which asked for the sizing requirements for the LDO’s quarters on two new containerhips that were being built and/or operated by Respondent, Pasha Group and/or Pasha Hawaii.

WE WILL continue to meet and confer with the Union for all arbitration proceedings at the Union's headquarters in Linthicum Heights, MD as set forth in Section 36 of the parties' 1984 MOU to their master CBA.

**SUNRISE OPERATIONS, LLC,
a WHOLLY OWNED SUBSIDIARY OF
THE PASHA GROUP**

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor t. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

901 Market Street, Suite 400, San Francisco, CA 94103-1735
(415) 356-5130, Hours: 8:30 a.m. to 5 p.m. Pacific Time

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/20-CA-219534 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (415) 356-5130